United Nations

AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1004

Case No. 1053: CAPOTE

Against: The Secretary-General of the United Nations

THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL,

Composed of: Mr. Mayer Gabay, President; Ms. Marsha A. Echols; Ms. Brigitte Stern;

Whereas at the request of Maria T. Capote, a former staff member of the United Nations Children's Fund (hereinafter referred to as UNICEF), the President of the Tribunal, with the agreement of the Respondent, extended to 30 November 1998 the time limit for the filing of an application with the Tribunal;

Whereas, on 30 November 1998, the Applicant filed an Application containing pleas, which read as follows:

"Section II: *Pleas*

7. ... [T]he Applicant respectfully requests the Tribunal:

...

(c) *To decide* to hold oral proceedings on the present Application ...;

8. On the merits, the Applicant respectfully requests the Tribunal:

(a) *To rescind* the decision of the Secretary-General summarily dismissing the Applicant;

(b) *To order* that the Applicant be immediately reinstated with full salary and benefits from the date of her separation from service;

(c) *To find and rule* that the manner in which the Respondent conducted its disciplinary review was procedurally flawed [and] tainted by extraneous considerations, and violated her rights to due process;

(d) *To find and rule* that the suspension without pay of the Applicant for an extended period was arbitrary, based on hearsay and exceeded the discretionary authority of the Respondent;

(e) *To find and rule* that the lengthy delays in and the procedural irregularities of the *ad hoc* Joint Disciplinary Committee proceedings violated the Applicant's right to a timely and fair hearing;

(f) *To find and rule* that the decision by the Executive Director sustaining the Applicant's summary dismissal was procedurally flawed, arbitrary, improperly motivated and based upon mistakes of law and of fact;

(g) *To order* that in addition to reinstatement the Applicant be awarded damages in the amount of three years' net base pay for the violation of her rights and for the resulting damage to herself, her family and her professional reputation."

Whereas the Respondent filed his Answer on 12 February 2001;

Whereas the Applicant filed Written Observations on 28 March 2001;

Whereas on 24 July 2001 the Tribunal decided that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant joined UNICEF on 19 June 1979, on a three-month fixed-term appointment as Clerk/Typist at the G-2 level, in the Accounts Section, Division of Financial and Administrative Management. At the material time, the Applicant held a permanent appointment as Budget Assistant at the G-6 level in the Division of Financial and Administrative Management, UNICEF.

On 20 December 1996, the Applicant was suspended with pay pending the results of an investigation concerning charges of misconduct placed against her by a Ms. Marianne Kelly, a fellow staff member. On 27 February 1997, the Applicant was summarily dismissed for serious misconduct for allegedly applying for, and opening, two joint credit card accounts in her own name and that of Ms. Kelly, without the latter's authorization, and for making false certifications.

In August 1994, the Applicant and Ms. Kelly entered into an oral agreement whereby the Applicant would pay Ms. Kelly's rent and other miscellaneous bills while she was on Mission in Rwanda. Ms. Kelly gave the Applicant 6 rent cheques and a Power of Attorney on her savings and checking accounts with the United Nations Federal Credit Union.

In December 1994 and August 1995, the Applicant applied for an AT&T Universal credit card and for a Citibank Visa credit card, respectively. Both applications were made jointly in the name of the Applicant and Ms. Kelly, naming Ms. Kelly as primary cardholder, but using the Applicant's address. The Applicant alleged that both applications were made with the full knowledge and consent of Ms. Kelly, as part of a series of financial transactions, which they discussed in a telephone conversation in December 1994 and at a meeting in August 1995 in New York.

Ms. Kelly returned from mission in September 1995. In a sworn statement dated 20 December 1996, she alleged that in August 1994, when she had to go on mission to Rwanda, she had asked a friend (the Applicant) to look after her financial affairs and that she had signed a Power of Attorney at the United Nations Federal Credit Union, authorizing the Applicant access to her accounts. She further alleged that on 12 December 1996, she was contacted by AT&T Universal Card Services and advised that her credit card was three months in arrears in the amount of $2500. She was informed that the account was in both names, but that she was designated "primary card holder". Subsequently, a credit check disclosed that a Citibank Visa account had also been opened in her name and was substantially in arrears. When she contacted the fraud investigators for AT&T and Citibank it appeared that the credit card application forms listed the wrong home address for Ms. Kelly and the wrong maiden name for her mother. In addition, in response to her question whether her signature had been forged, AT&T advised Ms. Kelly that a three-party telephone conversation had taken place in December 1994 between an AT&T representative, the Applicant and a third person who identified herself as Ms. Kelly.

According to Ms. Kelly, on 13 December 1996, she informed the Comptroller, UNICEF, of her discoveries.

On 20 December 1996, the Director, Division of Human Resources, UNICEF, transmitted a copy of Ms. Kelly's statement to the Applicant and informed her that, pending an investigation into these allegations, she was being suspended with pay.

On 27 January 1997, the Director, Division of Human Resources, UNICEF, informed the Applicant that she was being charged with serious misconduct. She was further informed that the allegations with which she had been charged had been confirmed by documentation received from AT&T, which revealed a number of "discrepancies and/or irregularities" on the application for the account, such as an incorrect telephone number and address, and the wrong maiden name for Ms. Kelly's mother. On 12 February 1997, the Applicant submitted her reply to the charges.

On 27 February 1997, Ms. Sham Poo informed the Applicant that the Executive Director had decided to summarily dismiss her on the grounds that her false certifications to AT&T constituted serious misconduct in violation of Article 101 of the United Nations Charter and staff regulation 1.4. In view of the seriousness of the Applicant's misconduct, immediate separation from service was warranted in accordance with staff regulation 10.2.

In a letter addressed to the Secretary-General dated 30 April 1997, the Applicant requested a review of her case by the United Nations Joint Disciplinary Committee (JDC). On 4 June 1997, the Director, Division of Human Resources, UNICEF, advised the Applicant that her case was being referred to an *ad hoc* JDC constituted by UNICEF. On 18 June 1997, the Applicant protested that the use of such an *ad hoc* JDC compromised her rights of due process and a fair hearing. After a series of exchanges of correspondence regarding the Applicant's concerns over its composition, the *ad hoc* JDC was constituted. Its report, dated 7 May 1998, stated in part as follows:

> "1. The Committee is of the opinion that due process and procedural requirements were fully respected, and [the Applicant] was properly informed of the charges against her and of her right to counsel. She was also properly given timely and reasonable opportunity to respond to the charges. Although the Appellant was placed on suspension with pay, she was informed that said suspension did not constitute a disciplinary measure. In addition, the Committee finds that all the evidence presented

by UNICEF has been shared with the Appellant and she has been given the opportunity to respond to any allegations and to seek the assistance of another staff member or retired staff member in formulating her responses to the charges.

2. The Committee is also of the opinion that the Executive Director has taken into consideration all material facts prior to the decision to suspend the Appellant with pay, charge her with misconduct and summarily dismiss her from employment with UNICEF.

3. The Committee is of the view that there was no bias or prejudice related to the decision of the Executive Director to summarily dismiss the Appellant for serious misconduct.

4. The Committee ... is of the opinion that the decision was properly taken in relation to the evidence, and with respect to the exercise of the Executive Director's discretionary authority in disciplinary matters."

On 14 May 1998, the Executive Director, UNICEF, transmitted a copy of the report to the Applicant and informed her as follows:

"...

I have re-examined the decision in light of the Committee's report and have taken note of the Committee's determination that the decision to summarily dismiss you was properly taken, and that there was no bias or prejudice related to that decision. I have therefore decided to maintain your summary dismissal.

..."

On 30 November 1998, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The decision to summarily dismiss the Applicant was tainted by improper considerations, procedural irregularities, and mistakes of facts and law.

2. The Respondent has failed to prove the allegations against the Applicant with a preponderance of the evidence as required by the rules of evidence applicable to disciplinary proceedings.

3. The Applicant's rights of due process and to an impartial and fair hearing were violated by the Respondent's improper use of an *ad hoc* JDC constituted by UNICEF instead of the independent and impartial United Nations JDC.

4. The accusations made against the Applicant are the result of a private complaint made by one individual against another and cannot be deemed to fit the concept of misconduct as defined in the Staff Regulations and Rules.

5. The denial of a hearing to present her views and to question her accuser constituted a serious breach of the Applicant's rights of due process.

6. The *ad hoc* JDC ignored the overwhelming weight of the evidence and violated the provisions of Administrative Instruction CF/AI/1190-05 and Chapter 15.5.22 of the UNICEF Personnel Manual.

Whereas the Respondent's principal contentions are:

1. The Executive Director of UNICEF has broad discretion with regard to disciplinary matters, and this includes the determination of what constitutes misconduct warranting dismissal. The decision of the Executive Director to summarily dismiss the Applicant for serious misconduct was a valid exercise of that discretionary authority.

2. The Executive Director's decision was based on facts adduced during UNICEF's investigation and substantiated in proceedings before the *ad hoc* JDC. The decision was not vitiated by mistake of law or fact, by lack of due process, or by prejudice or other extraneous factors.

3. The facts legally supported the finding that the Applicant had engaged in serious misconduct.

4. The decision of the Executive Director was not improperly motivated, the result of bias, or abuse of discretion.

The Tribunal, having deliberated from 29 June to 26 July 2001, now pronounces the following judgement:

I. The Applicant requests the Tribunal to rescind the decision by which she was summarily dismissed after an allegation was made that she had fraudulently opened credit card accounts in the name of a colleague, Ms. Kelly, and herself and had used the cards for her personal expenditures. No funds of the Organization are at issue. The Applicant claims that her actions were authorized by Ms. Kelly. She argues that certain of the actions taken by the Administration and related to her dismissal were procedurally and substantively flawed. She asks to be reinstated and for damages, among other relief.

The Tribunal considers that the evidence presented relates to a personal dispute that was within the jurisdiction of the credit card companies or the local police authorities. The Administration should not have involved itself to the extent of the suspension and the summary dismissal of the Applicant on the basis of an unsupported allegation by Ms. Kelly, which was followed by procedurally questionable proceedings. The Tribunal orders the Administration to reinstate the Applicant and to pay her six months of her net base salary as compensation for the harm she suffered as a result of the actions by the Administration.

II. Many facts of this case are agreed but the proper interpretation of them is in dispute. They point to circumstances of a personal nature but not to matters of immediate concern to the Administration. When the Administration acted to suspend the Applicant, there was no adequate basis for a finding of a civil or criminal wrong or of other conduct falling within Article 101 of the Charter of the United Nations or staff regulation 1.4.

III. In August 1994, the Applicant, a Budget Assistant, agreed to assist a friend and colleague, Ms. Kelly, during the latter's sudden posting to Rwanda in August 1994. She was given a power of attorney, which is not in the record, but that gave the Applicant access to Ms. Kelly's savings and checking accounts for the purpose of managing her financial affairs. At the least the two agreed that the Applicant would pay Ms. Kelly's rent and other bills. The Applicant was given six checks for the payment of the rent. There is general agreement regarding these facts.

IV. On the other hand, the interpretation of circumstances surrounding the opening of the two credit card accounts, which became substantially in arrears, is in dispute. According to the Applicant, she spoke with Ms. Kelly by telephone in December 1994 and was authorized to open joint credit card accounts, naming Ms. Kelly as the primary cardholder but using the Applicant's address. The Applicant opened an AT&T Universal credit card account in December 1994. She later opened a Citibank Visa account in August 1995, allegedly based on a meeting she held with Ms. Kelly in New York earlier that month. Ms. Kelly denies giving authorization, attending the meeting, and being the third person on the December 1994 telephone call to AT&T, when that account was opened. She says she returned from Rwanda in September 1995 and learned about the credit card accounts in December 1996, only after being contacted concerning the arrearages.

V. On 13 December 1996, Ms.Kelly informed the Comptroller of UNICEF of her discoveries, then made a notarized "Statement" dated 20 December 1996. On the same day the Applicant was suspended with pay pending the results of an investigation into Ms. Kelly's claims. She replied to the charges on 12 February and, based on the preliminary conclusions of the investigation, she was summarily discharged on 27 February 1997 for serious misconduct, *i.e.*, applying for and opening the two credit card accounts without authorization and for making false certifications on the applications for the credit cards. The Director, Division of Human Resources, UNICEF, informed the Applicant of the inconsistencies (false certifications) identified by AT&T, including the fact that she gave her own telephone number instead of her colleague's and the incorrect maiden name of the colleague's mother. The Executive Director of UNICEF classified the false certifications as serious misconduct in violation of Article 101 of the Charter and staff regulation 1.4, warranting immediate separation from service under staff regulation 10.2. An *ad hoc* JDC, in a brief 7 May 1998 memorandum to the Executive Director of UNICEF, found no fault with the decision of the Organization.

VI. An initial legal issue in this case is whether the circumstances described above fall within the disciplinary purview of UNICEF. The Tribunal finds that they do not. The Secretary-General has broad discretion regarding what may be considered to be misconduct. (See Judgement No. 941, *Kiwanuka* (1999).) The broad language of staff rule 110.1 refers in part to a

failure by a staff member to "observe the standards of conduct expected of an international civil servant". This is mirrored by the undertakings made by staff members through their regulations. For example, in staff regulation 1.1 staff members "pledge themselves to ... regulate their conduct with the interests of the United Nations only in view". Staff regulation 1.4 is somewhat more specific, requiring that staff "conduct themselves at all times in a manner befitting their status as international civil servants. ... They shall avoid any action ... which may adversely reflect on their status, or on the integrity, ... required by that status. ..." While a personal matter that reflects adversely on the Organization may be the subject of disciplinary proceedings, the Staff Regulations and Rules principally address conduct related to employment.

VII. This was purely an arrangement of some kind between colleagues regarding personal activities and personal funds. The Administration was not responsible for the financial affairs of Ms. Kelly, had no interest in her funds and could not affect the personal arrangement. It cannot be called on to use suspension with pay to oversee the personal affairs and relationships of its employees under circumstances such as these, i.e., the allegations by Ms. Kelly were disputed and were not in themselves "prima facie well founded". (Judgement No. 931, *Shamsi and Abboud* (1999), para. V). This conclusion is applicable also to the summary dismissal of the Applicant. When the Applicant was suspended, then summarily dismissed, there was an obvious recourse to the credit card companies or to the civil (or criminal) dispute resolution procedure provided by local law.

VIII. Whether or not the agreement was properly implemented did not affect the professional performance of either the Applicant or Ms. Kelly and did not reflect adversely on UNICEF. The actions of the Applicant, even if Ms. Kelly's characterization of them is true, were not incompatible with the proper discharge of her duties and were not actions that adversely reflected on her status or the independence or impartiality of that status and so were not incompatible with the second part of staff regulation 1.4 quoted above.

The more difficult question is whether the conduct of the Applicant ran afoul of the first part of staff regulation 1.4 , in that it did not befit her status as an international civil servant or in that it adversely reflected on her status or integrity to the extent that a suspension with pay

(although not a disciplinary measure) was justified. The Tribunal finds that the answer must be "no" under the circumstances of this case. It notes in particular that the suspension occurred after an unsupported allegation that fell far short of prima facie evidence of wrongdoing. The oral allegation was made on 13 December and the Applicant was suspended on 18 December 1996. It was not until early the next year that the Respondent had any other evidence of the alleged false certification.

IX. To determine whether the summary dismissal was justified, the Tribunal must also consider the mixed substantive and procedural challenges raised by the Applicant. First, it must be recognized that UNICEF properly referred this matter to an *ad hoc* JDC, as provided in the rules, rather than to the United Nations JDC. These decisions were contested by the Applicant but must be upheld. In contrast the delays in the proceedings before the *ad hoc* JDC cannot be justified. The Applicant requested on April 30, 1997 a review of her summary dismissal by a United Nations JDC. After disagreements regarding the appropriate JDC (United Nations or UNICEF, regular or *ad hoc*) and JDC panel (the staff association having refused to appoint a member to an *ad hoc* panel), the Applicant eventually agreed to proceed, while preserving her challenges to the body and its members. She was informed on 11 December 1997 of the composition of the *ad hoc* JDC, which issued its report and recommendations on 7 May 1998.

X. For the foregoing reasons, the Tribunal:

(a) Finds in favour of the Applicant and orders the rescission of the decision of the Respondent dated 27 February 1997 to summarily dismiss the Applicant for serious misconduct;

(b) Orders, in accordance with article 9 of its Statute, that the Applicant be reinstated in a position with the same grade and at the same step that she held when she was separated, with full payment of salary and emoluments from the date of her separation from service, less her earnings from other employment, if any;

(c) Should the Secretary-General, within 30 days of the notification of this judgement, decide in the interest of the Organization that the Applicant should be compensated without further action being taken in her case, the Tribunal fixes the compensation to be paid to

the Applicant at two years of her net base salary, at the rate in effect on the date of her separation from service; and

(d) Orders the Respondent to pay her six months of her net base salary as compensation for the moral injury suffered;

(e) Rejects all other claims.

(Signatures)

Mayer GABAY
President

Marsha A. ECHOLS
Member

Brigitte STERN
Member

Geneva, 26 July 2001

Maritza STRUYVENBERG
Executive Secretary